IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.3658 OF 2007
IN
SUIT NO.2399 OF 2007

Jitubhai Patel ... Plaintiff
versus
Tarak Chandra Roy ... Defendant

Mr.B.Saraf i/by Gajaria & Co. for plaintiff.

Mr.Venkatesh Dhond a/w Mr.H.W.Kane for defendant a/w NMS 3278/2007.

CORAM : A.M.KHANWILKAR, J.
DATE : 09th October 2007

PC :-

1. This motion is taken out by the defendant essentially for vacating ex-parte ad-interim order granted by this Court on 10th September 2007 passed below Notice of Motion No.3278 of 2007 in Suit No.2399 of 2007. The fact that this Court passed ex-parte ad-interim order on 10th September 2007 is not in dispute. It is also noticed from the order dated 10th September 2007 that the Court proceeded to pass such ex-parte ad-interim order on the assumption that the defendant in spite of service, has not chosen to appear before the Court.

2. The defendant by the present motion has

pointed out on affidavit that as a matter of fact the defendant was not served with any proceeding till 14th September 2007. The defendant has asserted on affidavit that from 6th September 2007 to 13th September 2007 he was in Kolkata making preparations for instituting a suit for infringement and passing off against the plaintiffs in High Court of Calcutta. He returned back on 14th September 2007 and was informed that the Postman had come to deliver letters of Gajaria & Co. (advocate for plaintiffs) on three occasions i.e. on 7th September 2007, 12th September 2007 and 13th September 2007, during which time the defendant was not at his home town at village Narayanpur, Post Duttaphulia, District Nadia. Besides, the Postman refused to hand over the letters to his wife. Immediately on return, the defendant received the letters in question intimating the defendant about date of hearing of this motion for ad-interim relief on 6th September 2007 and 10th September 2007 respectively. That was known to the defendant only on 14th September 2007. It is thus asserted that the defendant was never served before 10th September 2007 either with the letters or the telegram sent by the plaintiffs to inform the defendant about the date of hearing.

In fact, the telegram was received by the defendant on 21st September 2007. The position so stated by the defendant is supported by documentary evidence produced by the defendant which is attested copy of the relevant delivery slip register maintained by the concerned Post Office at Dattapulia S.O. Nadia. In view of this material produced by the defendant, it will be too much to assume that the defendant was in fact served either before 6th September 2007 or 10th September 2007 when the ex-parte ad-interim order came to be passed.

3. Counsel for the plaintiff, however, relies on the letter dated 8th October 2007 issued by the Manager, CCCE, Mumbai GPO addressed to the advocate for the plaintiff in response to the query made on behalf of the plaintiff. The said communication records that at present delivery of speed post article is location specific and not addressee specific. This communication, however, as presently advised, in no way belies the claim of the defendant which is stated on affidavit supported by the documentary evidence produced along with affidavit.

4. Suffice it to observe that this Court was

misdirected in proceeding on the assumption that the defendant was already served before 10th September 2007 as recorded in the order and which is the basis for passing the ex-parte ad-interim order on that date. Thus understood, in the interest of justice, the order dated 10th September 2007 deserves to be recalled and instead prayer for ad-interim relief will have to be considered afresh on its own merits uninfluenced by any order passed on this motion or the observations made in order dated 10th September 2007. Motion disposed of on the above terms. No order as to costs.

(A.M.KHANWILKAR, J.)